No. 87-622

In The

Supreme Court of the United States

October Term, 1987

VALLEY LIQUORS, INC., an Illinois corporation,
Petitioner,

vs.

RENFIELD IMPORTERS, LTD.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether or not the Petition for Writ of Certiorari of Petitioner presents a special or important reason for this Court to exercise its discretionary powers in reviewing the Seventh Circuit's decision wherein it unanimously affirmed the order of the United States District Court for the Northern District of Illinois granting Respondent's Motion for Summary Judgment.

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STATEMENT OF CASE

A. Nature of the Case

On November 10, 1981, Petitioner, Valley Liquors, Inc., ("Valley") a wholesale distributor of various brands of alcoholic beverages, filed a two Count Complaint against

the Respondent, Renfield Importers, Ltd., ("Renfield"). Count I alleged that Renfield, an importer of various brands of alcoholic beverages had acted in concert with Romano Brothers Beverage Company ("Romano") and Continental Distributing Co. ("Continental") by agreeing in the summer or fall of 1981 that Valley would be terminated as a distributor of Renfield products in the counties of DuPage, McHenry and part of Cook, "in an effort to restrain Valley's price competition with other distributors of Renfield brands" all in violation of 15 U.S.C. § 1 of the Sherman Anti-Trust Act. (R. 1, p. 3, par. 10)

Valley alleged that Renfield's violation of Section 1 of the Sherman Act constituted a horizontal conspiracy between Continental, Romano and Renfield and that Valley would suffer irreparable harm through the loss of customers, revenue and goodwill. Based upon said allegation, Valley sought a preliminary and permanent injunction prohibiting Renfield from denying Valley the right to act as a wholesaler of Renfield products in any geographical area then served by Valley. (R. 1, p. 3)

Count II of the Complaint alleged that Renfield breached an "implied term" of an "oral contract" between Valley and Renfield whereby Renfield had agreed not to "act unreasonably or in bad faith towards Valley particularly with regard to restrictions on a geographical area Valley would be assigned by Renfield." (R. 1, p. 4, par. 10, 11) Count II also sought injunctive relief and damages as a result of the purported breach of the oral contract by Renfield. (R. 1, p. 4)

On November 10, 1981, Valley filed a Motion for entry of a Temporary Restraining Order and Preliminary Injunction seeking to prevent Renfield from withdrawing permission for Valley to act as a Renfield wholesaler in any part of Illinois then served by Valley. (R. 4)

Said motion realleged the allegations contained in Counts I and II of the complaint and further alleged that

Valley had served as a wholesaler of Renfield products for over thirty years and that approximately one-half of Valley's business with Renfield had been generated from its wholesaling activities in the counties of DuPage, McHenry and part of Cook. (R. 4, par. 2, 3) Valley alleged that Renfield's decision constituted a breach of its "oral agreements and course of dealing with Valley to act reasonably in determining the geographical area within which Valley may serve as Renfield's wholesaler." (R. 4, p. 2, par. 5)

On November 12, 1981, Renfield filed a verified answer to the complaint denying the allegations contained therein, together with a Motion to Strike and Dismiss Valley's Motion for a Temporary Restraining Order and Preliminary Injunction. (R. 14) Renfield based its Motion to Strike and Dismiss upon the failure of Valley to set forth in either its motion or complaint, any facts with any degree of specificity or particularity which would entitle it to injunctive relief. Said motion was also based upon the failure of Valley to set forth with any degree of specificity and particularity facts supporting the existence of an oral contract and the terms thereof. Renfield attached to its motion, as Exhibit B, a written distribution agreement dated May 12, 1955, by and between Renfield and Valley, which provided that Valley did not have any right to an exclusive distributorship in the state or in any area to which it was appointed by Renfield and that Renfield and/or Valley could terminate the relationship at any time and for any reason upon written notice.

The lower court held hearings on Valley's Motion for Injunctive relief on November 10, 13, and 16, 1981, and the court entered its order denying Valley's requested relief on November 17, 1981. Though subpoenaed by Valley and present in open court, neither Michael J. Romano and Donald J. Romano of Romano nor Fred Cooper of Continental were called by Valley to testify.

Valley appealed the district court's order and the Seventh Circuit affirmed same in *Valley Liquors, Inc. v. Renfield Importer's, Ltd.*, 678 F. 2d 742 (7th Cir. 1982).

On June 2, 1983, Valley filed an Amended Complaint which Renfield answered on June 14, 1983. (R. 45 and 47) Renfield also filed a Motion to Dismiss Valley's Amended Complaint. (R. 48).

Valley's Amended Complaint contained three counts. The first, realleged the horizontal conspiracy set forth in its first complaint. The second count also alleged a violation of Section 1 of the Sherman Act, however, Valley's theory was that Renfield's realignment amounted to a vertical restriction which was an unreasonable restraint of trade under the "rule of reason" test.

Count III of Valley's Amended Complaint alleged Renfield's breach of the written distributor agreement between the parties. Therefore, Valley abandoned its claim pursuant to the alleged oral contract.

Following the Seventh Circuit's order and remand in the earlier appeal, both parties conducted extensive discovery. Renfield then filed a Motion for Summary Judgment which was supported by a Memorandum, Supplemental Memorandum and the affidavit of Professor John P. Gould, Jr., ("Gould") Renfield's expert. (R. 36, 71) Gould was a Professor of Economics and Dean of the Graduate School of Business at The University of Chicago. (R. 71, Exh. A, p. 1).

Valley responded to Renfield's motion and tendered the affidavit of its expert, Joseph P. Gunn, III, an economist and Vice-President of the consulting firm of Robert R. Nathan Associates, Inc. in Washington, D.C. (R. 59, 62, 76).

On December 31, 1985, the district court entered an Order and Memorandum Opinion granting Renfield's Motion for Summary Judgment as to all three counts of

Valley's Amended Complaint. (R. 97, 98). Thereafter, Valley appealed the district court's order to the United States Court of Appeals for the Seventh Circuit. On June 3, 1987 the Seventh Circuit unanimously affirmed the district court. Following a denial of Valley's Petition for Rehearing, with Suggestion for Rehearing In Banc, Valley filed its Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

B. Statement of Facts

The facts of this case are quite clearly set forth in the record and in the Opinions of both lower courts. Inasmuch as the record before this Court is exceedingly complete and the trial court order from which the appeal to the Seventh Circuit arose was preceded by in excess of 100 pages of briefs filed by Renfield. Renfield will simply summarize the facts in the interest of brevity.

Valley instituted this action following the implementation of Renfield's decision to realign its distributorship network throughout each of Illinois' 102 counties. The decision to realign came as no surprise to Valley since it is uncontroverted that nearly five months prior to the implementation of its realignment, representatives of Renfield met separately with each of its distributors to inform them of the same. (R. 19, p. 46)

It is also uncontroverted that the realignment effected all of Renfield's distributors in that some were terminated entirely; some lost the right to distribute certain of Renfield's brands; some lost the right to distribute Renfield products in certain geographical areas; and some faced a combination thereof. (R. 89, pp. 21, 27, 30-35) In other words, the realignment as it effected Valley was a minute aspect of what was a statewide decision on the part of Renfield.

On October 22, 1981, Valley was notified by Renfield that its distribution rights were being modified. (R. 19,

p. 15) More specifically, Valley was informed that it no longer had the right to distribute Renfield products in Cook, DuPage and McHenry counties; that it would retain the exclusive right to distribute Renfield's products in the counties of Will, Winnebago, Carroll, Boone, Bureau and Whiteside; and that it would have the dual right to distribute said products in DeKalb, Kane and Kendall counties. Therefore, Valley was not terminated as a Renfield distributor.

The election made by Renfield followed an analysis by Renfield personnel as to why Illinois sales were inferior to that of Renfield's national sales figures. (R. 89, pp. 30-35) Furthermore, although at the time Valley instituted this action it was unaware that a written distributor agreement was in force between it and Renfield. Renfield's decision was entirely in conformity with said written agreement. (R. 1, p. 4, par. 10, 11) The parties do not dispute the fact that said agreement permits Renfield to terminate or alter Valley's right to act as a Renfield distributor for any reason and at any time. (Valley brief, p. 47).

Valley alleged in Count I of its Amended Complaint that Renfield and two of its other distributors, Romano and Continental, conspired to terminate Valley's distributorship rights in Cook, DuPage and McHenry counties in order to "restrain price competition" to "fix and maintain prices" and to "lessen competition." (R. 45, p. 3, par. 10) Said Count alleges that said conduct is a horizontal consipracy and as such is a *per se* violation of Section 1 of the Sherman Act. (R. 35, p. 3, par. 10)

Count II of the Amended Complaint also alleged a violation of Section 1 of the Sherman Act, however, it charged that due to Renfield's "substantial market power," its elimination of Valley in the aforesaid counties would reduce price and non-price competition among Renfield's distributors and, therefore, constitutes an unreasonable restraint of trade. (R. 45, p. 5, par. 12) Valley admitted that this

Count was not to be scrutinized as a *per se* violation, but rather, pursuant to the "rule of reason" test enunciated by the United States Supreme Court in *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977).

Count III of Valley's Amended Complaint alleged that Renfield breached the written distributor agreement in that the form of the notice to Valley informing it of the realignment was improper; that Renfield, "without reason and in bad faith," terminated Valley as a Renfield distributor; and that Renfield "induced Valley to increase its purchases in McHenry, DuPage and Cook Counties." (R. 45, p. 7, par. 15)

Initially, Valley sought emergency injunctive relief which, after a three day hearing, the district court denied. Valley appealed the district court's order denying said relief and the Seventh Circuit affirmed. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982).

Following the Seventh Circuit's first opinion and remand, extensive discovery was undertaken by Renfield and Valley which resulted in Renfield filing its Motion for Summary Judgment. On December 31, 1985, the district court entered an order granting Renfield's motion as to all three counts of Valley's Amended Complaint. (R. 97) It is from said order that the second appeal to the Seventh Circuit arose. As has been stated, the Seventh Circuit unanimously affirmed the trial court's order granting summary judgment in favor of Renfield on all counts of Valley's Amended Complaint.

REASONS FOR DENYING THE WRIT

Introduction

Under the heading "Statement of Case" Valley once again makes misstatements which were not accepted by the trial court or by the Seventh Circuit in either of the appeals. Valley persists in doing this not in an

effort to demonstrate the existence of a genuine issue of material fact, but to create one.

First, at page 6 of its Petition, Valley alleges that it was Renfield's "best" distributor. The outcome of this cause would not have been altered one bit if that statement was credible, however, the record simply does not support that conclusion. To the contrary, the record is filled with testimony by Renfield employees which supports the notion that, overall, Renfield's distributors were on a par. (R. 19, 20)

Next, at page 8 of its Petition, Valley would have this Court believe that Valley's competitors consistently complained to Renfield relative to Valley's discounting practices and that each continually demanded the exclusive right to distribute Renfield products. In point of fact, the record is clear that *all* distributors (including Valley) complained from time to time about *all* other distributors and that *all* distributors (including Valley) requested to be Renfield's exclusive distributor. (R. 89, p. 47) Further, it is uncontroverted that following Renfield's state-wide distributor realignment, Valley retained exclusive distributorship rights in several Illinois counties.

Valley's allegations also lack merit for as this Court stated in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984) "permitting an agreement [to fix prices] to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct . . . [C]omplaints about price cutters 'are natural - and from the manufacturer's perspective, unavoidable - reactions by distributors to the activities of their rivals.' "

I. THIS COURT SHOULD NOT EXERCISE ITS SUPERVISORY POWERS TO REVIEW THE DECISION BELOW

The first reason advanced by Valley in support of its Petition is that the Seventh Circuit has allegedly undertaken a course of conduct such that an antitrust defendant has a much greater chance of prevailing in litigation than an antitrust plaintiff. Valley believes that this Court must review the Seventh Circuit's opinion so as "to deliver a clear, unmistakable message that this Court's holdings control and are binding and that the inferior courts are not permitted to pick and choose among this Court's holdings to develop their own, separate bodies of federal law." (Valley Petition at p. 18).

Valley has indicted the Seventh Circuit despite the fact (or perhaps because of the fact) that its Petition for Preliminary Injunction was denied after a three-day evidentiary hearing; that the denial was affirmed on appeal with an opinion being delivered by one of this country's pre-eminent antitrust scholars, the Honorable Richard Posner; that after the parties developed a voluminous and terribly complete record, the trial court granted Renfield's motion for summary judgment; and that the Seventh Circuit unanimously affirmed that order on appeal. In other words, Valley has had not just one day in court, it has had several days before several judges. It is not without surprise that when one continually fails to succeed, one will cast blame upon the decision maker. This is not a valid argument, however, in favor of invoking this Court's discretionary appellate powers.

Renfield believes that the trial court and Appellate Court judiciously studied the issues raised by the pleadings and the evidence presented by both parties and that the ultimate result is entirely consistent and in line with this Court's pronouncements. This matter was instituted and decided solely upon antitrust theories. Consequently, Valley's charge that the Seventh Circuit is "out of step"

with this Court and other circuits concerning "securities laws, the Racketeer Influenced and Corrupt Organization Act, employment discrimination, civil rights and the fundamental rights guaranteed by our Constitution" is no more than a meaningless resource wasting editorial. It also is not a reason for this Court to review the Seventh Circuit opinion in the subject cause.

II. THE SEVENTH CIRCUIT HAS NOT MISAPPLIED SUMMARY JUDGMENT PRACTICE

Valley has taken the position that antitrust litigation should not be disposed of upon a motion for summary judgment. Such a proposition is without authority. Indeed, many antitrust matters including landmark cases were disposed of in that fashion. See *Matsushita Electric Industry Co. v. Zenith Radio Corp.*, ___ U.S. ___ 106 S. Ct. 1348 (1986); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). As the Seventh Circuit correctly pointed out at footnote 4 of its decision in this cause:

> "Indeed, the [United States Supreme] Court appeared to encourage the use of summary judgment where appropriate in *Matsushita* and two other cases handed down the same term, see *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986)." 822 F. 2d at p. 659, n. 4.

Valley relies heavily upon both the majority and dissenting opinions in *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505 (1986). On the one hand, Valley urges the Court to heed the warning contained in Justice Brennan's dissenting opinion that "... full blown paper trial[s]" must be avoided. 106 S. Ct. at p. 2519. On the other hand, Valley would read the majority's opinion as being support for the proposition that the Seventh Circuit's decision was faulty.

In reality, the reasoning of the majority in *Anderson* was quite literally and correctly followed by the Seventh Circuit. There was extensive discussion by the lower court

as to the parameters set by this Court in *Anderson*. At page 659 of its opinion, the Seventh Circuit explained:

> "After Renfield moved for summary judgment, Valley had the responsibility of going beyond the pleadings and setting forth 'specific facts showing that there [was] a genuine issue for trial.' Fed. R. Civ. P. 56(e); see *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). A grant of summary judgment was then proper if 'there [was] no genuine issue as to any material fact and if [Renfield was] entitled to judgment as a matter of law.' Fed. R. Civ. P. 56(c) . . . A genuine issue for trial only exists when there is sufficient evidence favoring the nonmovant for a jury to return a verdict for that party. *Id.* As the Supreme Court has stated, '[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.' We must not weigh the evidence."

It is thus unquestionable from a review of this langauge from the Seventh Circuit's opinion that it fully recognized the standards for reviewing a motion for summary judgment as articulated by this Court in *Anderson*. Valley makes the argument, however, that the lower court failed to adhere to these standards; the very same argument it proferred to the Seventh Circuit concerning the trial court's order granting Renfield's motion for summary judgment. To that argument the Seventh Circuit responded:

> "Valley asserts that the district court acted improperly in weighing the evidence. Valley does not, however, provide any examples. We find that the district court properly considered Valley's evidence, took inferences in Valley's favor, and decided that the evidence was not adequate to persuade a reasonable jury that Renfield conspired to modify Valley's distribution rights." 822 F. 2d at 659, n. 3.

Therein lies the difference between reality and Valley's position. Valley's *disagreement* with the lower courts' decisions is not tantamount to the courts' failure to

properly apply summary judgment analysis. Valley's disagreement is best illustrated by a reference to its Petition wherein it argued that:

> "[Valley] directed the trial court to the testimony of six of [Renfield's] employees, [Renfield's] sales records, trade documents, the deposition transcript of [Renfield's] expert, and the affidavit of [Valley's] own expert, which affidavit addressed and controverted each of the expert opinions advanced by [Renfield's] expert. If that evidence had been accepted and believed (as this Court required in *Anderson*), one would have concluded that [Renfield] possessed market power in a relevant market, that [Renfield's] restraint of trade in that market impaired competition unreasonably, and that [Renfield's] termination of its best and lowest-priced distributor resulted from a conspiracy to fix prices and not from [Renfield's] exercise of independent business judgment." (Valley's Pet. at pp. 20-21).

Valley's application of the *Anderson* analysis is what is misplaced. Valley's argument carried to the extreme is that if a plaintiff and a defendant disagree as to the factual scenario in a particular case, or produce evidence in support of their respective differing positions, a court may never grant summary judgment. Clearly, such a conclusion is unthinkable. This Court in *Anderson* did not stop the summary judgment analysis at the stage where it is to "believe" the nonmovant's evidence. Rather, the court must believe *sufficient* evidence and draw *justifiable inferences* in favor of the nonmovant.

The Seventh Circuit posed, in the form of an issue, this Court's instructions relative to a review of the propriety of the trial court granting Renfield's motion for summary judgment:

> "Thus we will find that the district court properly granted summary judgment for Renfield on each of the three counts of Valley's amended complaint *if we determine that there was no genuine*

> *issue of material fact for trial, which turns on our decision that there was insufficient evidence, taking into account the evidentiary inferences in Valley's favor, to allow a rational jury to decide for Valley."* 822 F. 2d at p. 659. (Emphasis added.)

Unquestionably, the Seventh Circuit articulated the issue so as to meticulously adhere to this Court's teachings in *Anderson*. As will be more fully argued below, the Seventh Circuit resolved the issue in favor of Renfield because:

1. Valley presented no direct evidence of a conspiracy and the inferences drawn from its circumstantial evidence were far too tenuous to rebut Renfield's direct evidence of independent conduct. Consequently, Valley failed to exclude the possibility that Renfield acted independently; and

2. Valley at no time denied Renfield's 3% or less market share in any geographical area in a product market which both Renfield and Valley agreed upon. Further, the inference to be drawn from Renfield's 21% decline in sales has nothing whatsoever to do with *market output* so Valley failed to persuade the lower court to infer that Renfield possesses market power.

Therefore, it is manifestly obvious that the lower court not only correctly stated the rules concerning the propriety of summary judgment in antitrust cases, but properly applied those rules to the facts at bar.

III. THE SEVENTH CIRCUIT CORRECTLY HELD THAT VALLEY FAILED TO SATISFY ITS BURDEN OF PROOF IN ESTABLISHING THE EXISTENCE OF AN ANTITRUST CONSPIRACY

This Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) defined the burden of proof placed upon an antitrust plaintiff in establishing a conspiracy in violation of Section 1 of the Sherman Act. 15 U.S. C. §1. At page 764 this Court stated that:

> "... something more than evidence of complaints is needed. There must be evidence that tends

> to exclude the possibility that the manufacturer and non-terminated distributors were acting independently."

Valley does not quarrel with this statement of the burden of proof and, in fact, concedes that the burden was squarely upon its shoulders.

In a futile attempt to create a question of fact, Valley argues that notwithstanding the fact that it satisfied the *Monsanto* burden, the Seventh Circuit placed a higher burden upon it in affirming the district court's order of summary judgment in favor of Renfield. Valley contends that the Seventh Circuit undermined this Court's holding in *Monsanto* and created a new standard of proof relative to antitrust conspiracies:

> "By requiring an antitrust plaintiff to prove at the summary judgment stage that the defendant's termination of the plaintiff as a distributor did not result from an erroneous business judgment is to effectively eliminate the antitrust laws as a remedy for terminated distributors. The court's opinion places an insurmountable burden upon the antitrust plaintiff." (Valley Pet. at pp. 23-24).

Valley's interpretation of the Seventh Circuit's decision bears no rational relationship to what that court actually said. The only context in which the lower courts discussed the notion of "erroneous business judgment" was in response to Valley's faulty syllogism that (a) inasmuch as Valley was terminated by Renfield; and (b) Renfield's sales in the Chicagoland area subsuquently declined 21%, it must follow that; (c) the decision to terminate Valley was not predicated upon independent business judgment. The syllogism lacks any degree of logic and as importantly, was never articulated by the courts below as a standard of proof which Valley must satisfy. To argue to the contrary is to intentionally mischaracterize the lower courts' holdings.

The Seventh Circuit correctly reminded Vally that the burden of excluding the possibility of independent conduct

is upon the non-moving party; to wit, Valley. *Valley*, 822 F. 2d at p. 664. That fact notwithstanding, Renfield, through its Senior Vice President, Ponti Campagna, said on deposition that:

"Q. We have been dancing around this question, so we may as well get to it.

Why did you select Continental and Romano Brothers as the two distributors for McHenry and DuPage Counties?

"A. You could have asked that first when you came into the deposition only for the reason what we are asking is my judgment, and that is what it boils down to. I don't think my philosophy is wrong in what I've done, because it was proven by studies and throughout the liquor industry that the production benefits the brand.

My actual choice was made for Romano Brothers and for Continental because of the following circumstances: The combined manpower total of Romano Brothers and Continental was greater than the combined manpower of any other combination. I had to make sure that with the increased volume the distributors were receiving and the increased profitability, that we maintained coverage because that was a critical part of our problem.

I explained to you that Valley had a portion of Cook County while the Romano Brothers and Continental had Cook, DuPage, Lake, and McHenry; so I really considered them having a greater responsibility throughout their entire tenure of Renfield than Valley did. I felt that the combined portfolios of Romano Brothers and Continental might be more beneficial to Renfield, the meld of brands. We compete for business with the distributor in-house. The distributor has salesmen, has a selection of brands to sell. He has other gins to sell, other vodkas to sell, other wines to sell; so I am competing within the house, also. I felt that, in my opinion, that the two distributors, Continental – because of Continental's length of time in the marketplace, their reputation, and the fact that Romano Brothers were very hungry and they needed

> our line probably more than any other distributor from the standpoint of the balance of their portfolio, would give me a better chance to succeed in that marketplace over the long haul.
>
> It wasn't a question, sir, of terminating a distributor for lack of performance; it was a question of reducing the total number of distributors in the marketplace. And since it had to go from four to two, it came down to a judgment call, whether Campagna made the right decision or wrong decision. . ." (R. 89 at pages 66-68)."

The lower court held that since Renfield advanced direct evidence, in the form of Campagna's testimony, that it acted independently, Valley had the burden to present evidence to refute Renfield's. Valley simply failed to do so. In an attempt to hide its evidentiary short-comings, Valley suggests that since Renfield failed to assert the affirmative defense of "erroneous business judgment" it follows that Valley met the *Monsanto* burden since it was terminated despite being Renfield's lowest-priced distributor following complaints from its competitors.

If Valley's proposition is accepted by this Court, it can truly be said that the burden of proof established by *Monsanto* will have been emasculated if not wholly eliminated. Although Renfield executives and shareholders may be interested in knowing whether or not the business judgment employed in its statewide distributor realignment was successful, such knowledge has absolutely nothing whatsoever to do with Valley's burden of proving an antitrust conspiracy to fix prices.

It must be remembered that despite the fact that Valley had the burden of *excluding the possibility* that Renfield's conduct in terminating Valley was based upon its independent business judgment, the following evidence was adduced below:

1. at depositions called by Renfield, principals of both the alleged co-conspirators testified that they had nothing

to do with the decision to terminate Valley and, in fact, never discussed the issue with Renfield, (R. 68, 70)

2. a principal of Valley testified in open court that during the lengthy relationship between Renfield and Valley, Renfield never took part, in any way, in setting Valley's retail prices (R. 20 pp. 111 and 115); and

3. at his deposition, Campagna clearly and unequivocally stated the elements which he considered in rendering his realignment decisions.

Valley has yet to rebut any of the aforesaid evidence. Rather, it simply fails to acknowledge that this evidence exists. This is most plainly evident by Valley's repeated assertions that Renfield never offered a reason for terminating Valley. Clearly, notwithstanding the fact that the burden of proof was upon Valley, Renfield did offer its reasons; however, Valley closes its eyes to them.

Consequently, the Seventh Circuit completely adhered to the *Monsanto* doctrine and properly applied the burden of proof analysis to the evidence presented. If this Court were to accept Valley's convoluted argument, the *Monsanto* standard would truly be undermined.

IV. IN A RULE OF REASON ANALYSIS THE THRESHOLD INQUIRY IS WHETHER OR NOT THE ANTITRUST DEFENDANT POSSESSES POWER IN AN ECONOMICALLY MEANINGFUL MARKET AND CONSEQUENTLY THE SEVENTH CIRCUIT DID NOT ERR IN REQUIRING PROOF OF RENFIELD'S MARKET POWER

The thrust of Valley's fourth reason for granting its Petition is that since Renfield's sales in the Chicagoland area declined 21% in the two years following the termination of Valley, the threshold requirement of determining whether or not Renfield possesses market power should be dispensed with. Valley's sole source of support for this proposition is *Federal Trade Commission v. Indiana Fed-*

eration of Dentists, ___U.S. ___, 106, S. Ct. 2009 (1986). As will be made clear below, *Indiana Dentists* does not aid Valley.

This Court stated in *Indiana Dentists* that when there is proof of *actual detrimental effects upon competition*, such as a reduction of output, a court need not require elaborate market analysis. 106 S. Ct. at 2019. Valley contends that Renfield's drop in sales following its distributor realignment is proof of an actual detrimental effect upon competition. Again, Valley's syllogistic reasoning cannot stand on its own.

Essential to any market analysis is a definition of economically meaningful relevant geographic and product markets. Renfield and Valley agree that the relevant product market is distilled spirits and wine. Valley argued that the geographic market was a five country region known as the "Metro-Chicago" region. Renfield argued that the geographical market was the entire state of Illinois at a minimum and the United States at a maximum. Regardless of the geographical market, however, Renfield proved by direct evidence, that its market share in *any* geographical area was 3% or less. Valley did not even attempt to rebut that fact.

With these market factors in mind, Valley's definition of output becomes quite suspect. In other words, *Renfield's* loss of sales following Valley's termination is not tantamount to proof of an actual adverse impact upon competition in the relevant market. The product market is not defined as Renfield's distilled spirits and wines as Valley apparently believes. Rather, it is *all* distilled spirits and wines in the geographic area and there has been no showing by Valley that gross output of distilled spirits and wines were effected at all. In fact, one can reasonably infer that since Renfield possessed only 3% or less of the product market, its 21% decline in sales in the marketplace was offset by increased sales of others already in the market

and/or by new entrants therein.

Valley failed to offer proof that due to Renfield's actions, the consumer had less gin, vodka or other spirits or wines available to it. Such evidence does not exist and the inference of same is far too speculative. If, *arguendo*, Renfield hurt itself by its realignment, as evidenced by a decline in sales, that detrimental effect is Renfield's alone. A powerless firm is incapable of effecting, adversely or otherwise, the marketplace and Renfield is indisputedly powerless.

It is noteworthy that Valley acknowledges Renfield's drop in sales but in the same breath would ask this Court to believe that Renfield possesses market power such that it has the ability to raise its prices without losing all of its sales. These two notions are squarely at odds with one another. Despite that irreconcilable conflict, Valley, at page 27 footnote 2 of its Petition continues to mischaracterize the testimony of Renfield's executives. They did not testify that prices could be meaningfully raised without fear of a loss of sales. Valley posed questions dealing with hypothetical price increases on a per bottle basis without establishing a foundation of any kind as to the meaningfullness of the hypothetical increases. The courts below correctly held that the hypothetical questions were not probative and the answers were not indicative of market power.

Thus, it can be seen that Valley failed to establish a decline in output in the relevant product market, or any other actual detrimental impact upon competition. Therefore, *Indiana Dentists* is not supportive of Valley's position. In the absence of proof of actual detrimental effects, the Seventh Circuit properly held that Valley failed to prove the threshold inquiry; that Renfield possessed market power. Consequently, there was no need to proceed to the balancing test concerning intrabrand and interbrand competition. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678

F.2d 742, 745 (7th Cir. 1982).

Finally, Valley argues that since both it and Renfield presented affidavits of experts relative to rule the of reason analysis, it was improper for the district court to grant Renfield summary judgment. If such simplistic reasoning is accepted by this Court, a clear message will be sent to nonmovants that summary judgment can be avoided simply by the submission of an affidavit with divergent views from that in support of movant. Renfield respectfully submits that there is no judicial authority for such a message.

The lower courts in this cause examined all of the evidence presented by Renfield and Valley, including expert affidavits. After conducting the analysis called for in *Anderson, supra,* the conclusion was reached that no genuine issue of material fact existed and that as a matter of law, Renfield:

1. did not conspire to fix prices;
2. does not possess market power in the relevant markets;
3. did not and could not restrain trade; and
4. did not breach its contract with Valley

CONCLUSION

Valley has failed to raise a special or important reason for this Court to exercise its discretionary powers in reviewing the Seventh Circuit Court of Appeal's decision in this case. Valley misapprehends well settled principles of economics and antitrust law. The Seventh Circuit affirmed a well reasoned district court order and opinion granting the motion for summary judgment of a powerless firm; one with an undisputed 3% market share in an undisputed product market. The result is entirely consistent with all of this Court's teachings and creates no conflicts whatsoever.

For the reasons advanced hereinabove, the Respondent, Renfield Importers, Ltd. respectfully urges this Court to deny the Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals in this cause.

Respectfully submitted,

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